

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1965

No. **40**

ELIZABETH ROSALIA WOODBY,

*Petitioner,*

v.

IMMIGRATION &amp; NATURALIZATION SERVICE,

*Respondent.*

On Writ of Certiorari to the United States Court  
of Appeals for the Sixth Circuit

**BRIEF FOR THE PETITIONER**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1965

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No. 825

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ELIZABETH ROSALIA WOODBY,

*Petitioner,*

v.

IMMIGRATION & NATURALIZATION SERVICE,

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On Writ of Certiorari to the United States Court  
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**BRIEF FOR THE PETITIONER**

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**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Sixth Circuit is found on Pages 127-133 of the record. This opinion has not been reported.

**JURISDICTION**

The judgment of the Court of Appeals was entered on September 16, 1965 (R. 126). The Petition for Certiorari was filed on December 15, 1965 and granted on April 18, 1966 (R. 133; 86 S. Ct. (1966) 1336). The jurisdiction of this Court is conferred by 28 U. S. C. Section 1254.

## QUESTION PRESENTED

I. Were the decisions of the Board of Immigration Appeals and also of the special inquiry officer supported by "reasonable, substantial and probative evidence on the record considered as a whole"; and parenthetically what does "reasonable, substantial and probative" mean?

II. Did the United States Court of Appeals for the Sixth Circuit commit error by not returning the case to the Immigration Service to adduce additional evidence as provided in 5 U.S.C. 1037-c?

## STATUTES INVOLVED

Section 242 (b) of the Immigration and Nationality Act, 8 U.S. Code Section 1252 (b), provides in part:

"(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence."

Section 106 (a) (4) of the Immigration and Nationality Act, as amended, 8 U.S. Code Section 1105 (a) (4), provides in part:

"... the petition (for review of a deportation order) shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive."

5 U.S.C. 1037 (C) provides:

If a party to a proceeding to review shall apply to the Court of Appeals, in which the proceeding is pending, for leave to adduce additional evidence and shall show to the satisfaction of such court (1) that such additional evidence is material, and (2) that there were reasonable grounds for failure to adduce such evidence before the agency, such

court may order such additional evidence and any counter-evidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken and may modify or set aside its order and shall file a certified transcript of such additional evidence, such modified findings or new findings, and such modified order or the order setting aside the original order.

### **STATEMENT OF FACTS**

The Petitioner is a 34 year old female, who married an American soldier in Germany while he was stationed there. She gave birth to one child in Germany, and remained there for more than a year after her husband returned to the United States. She arrived in the United States in February of 1956, and she, her husband and their daughter lived with her husband's parents in Harlan, Kentucky. A few months later they moved to Dayton, Ohio, where her son was born prematurely on August 13, 1956 (R. 55). At that time the Petitioner, her husband and daughter lived at 528 Notre Dame, Dayton, Ohio, and lived at that address for approximately four months after the birth of the child (R. 56), this would have been approximately January 1, 1957. At that time the Petitioner's husband virtually forced her to go to Pennsylvania to visit a friend. She returned the next day to find that her husband had taken the children and had moved to Kentucky. She had no funds to follow him and later employed counsel to get the children back. The Petitioner went to work at McCrory's 5 & 10¢ store, and worked there approximately three months (R. 59). This would place the time at approximately April 1, 1957. The Petitioner then went to work at Neil's Restaurant, and at the same time had moved her residence to Summit Court (R. 59). The Petitioner received a telephone call from her husband, who was in

Kentucky, stating that he needed \$300 at once for an operation for the baby. The baby was supposed to be in the hospital and the husband did not have any insurance or Blue Cross to pay the hospital, and they were not going to perform the operation unless they were paid the \$300 in advance (R. 59), and she was led to believe and did believe that the child would die if the operation were not performed.

The next day a vacuum cleaner salesman, by the name of Tom Walley, came to the door to sell the Petitioner a vacuum cleaner, and she told him the story. He told her that he could help her get the money, since she knew no one else from whom she could borrow the money. He left the apartment and returned with a bottle of whiskey and another man. He took some pictures of her, and it appears that men started coming to the apartment the next day (R. 48). These arrangements continued for approximately two months, until the Petitioner had repaid the \$300 which she needed for the operation for her son (R. 62). When the Petitioner attempted to cease the arrangement which she had, she was threatened by Walley with being reported to the immigration authorities and the police (R. 45). Even facing these threats of blackmail, the Petitioner terminated this relationship with Mr. Walley, and moved to Knoxville, Tennessee to get away from Walley and remained there until July 4, 1957 (R. 63 and 68). A Mrs. Jackson, a friend of petitioner, drove to Knoxville, to pick up the Petitioner and brought her back to Dayton, Ohio, where the Petitioner lived with Mrs. Jackson on Rugby Road. They lived there from July 4th, 1957 until some time in September, 1957, when they moved to 1500 W. Riverview, above Neil's Restaurant, where the Petitioner was working (R. 68). Mr. Amicon met the Petitioner at Neil's restaurant in October, 1957 where she was working (R. 50). Mr. Amicon was introduced at the restaurant to the Petitioner as an alleged prostitute, but

he found that she was not, and that she had ceased all such actions after she had repaid the money which was needed for her son's operation. Amicon testified that he was willing to marry the Petitioner (R. 51). (The Petitioner has been a widow since July 14, 1957, when her husband was killed in an automobile accident.)

### **ARGUMENT**

- I. WERE THE DECISIONS OF THE BOARD OF IMMIGRATION APPEALS AND ALSO OF THE SPECIAL INQUIRY OFFICER SUPPORTED BY "REASONABLE, SUBSTANTIAL AND PROBATIVE EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE"; AND PARENTHETICALLY WHAT DOES "REASONABLE, SUBSTANTIAL AND PROBATIVE" MEAN? MUST THE GOVERNMENT PROVE THE FACTS ON WHICH THE DEPORTABILITY OF THE ALIEN DEPENDS, BY A MERE PREPONDERANCE OF THE EVIDENCE, OR DOES IT HAVE A GREATER BURDEN?**

In order to have a proper perspective of this case, it is necessary to divide the periods of time into two separate parts. The first period of time commences approximately April 1, 1957 when the Petitioner admitted she began engaging in acts of prostitution. The first period of time ceases approximately June 1, 1957 when the Petitioner alleges that she terminated her acts of prostitution and left for Knoxville, Tennessee (R. 63).

The second period of time, which we are concerned with, commences at the end of the first period or approximately June 1, 1957, when the Petitioner stated that she ceased engaging in acts of prostitution and continues until some time in 1958 when the Special Inquiry Officer and the Board of Immigration Appeals found that the Petitioner had actually ceased engaging in acts of prostitution.

For the period April 1, 1957 to June 1, 1957, there is no question that the Petitioner did engage in acts of prostitu-

tion, for she admitted this. Her defense to these acts of prostitution, was that she was acting under duress.

There appears to be no purpose in discussing the law which relates to the fact that the Petitioner's acts of prostitution that were committed during this period of time, are legally excusable because of duress. The basis of the special inquiry's officer's decision (R. 78), was that he found that after the duress has terminated, the Petitioner continued to engage in acts of prostitution. This decision is substantiated by the decision of the Board of Immigration Appeals (R. 112) where this Board again found that the Petitioner engaged in prostitution after duress had ended. There was no finding that the Petitioner was not acting under duress and so therefore, this Brief is being restricted to the facts and law that relates to the facts that occurred after July 4, 1957, when the Petitioner returned from Knoxville, Tennessee (For our Brief on the law of duress, see R. 85-96).

The question that is raised is, during the second period of time which commences approximately June 1, 1957, what evidence was there to support the findings of the Special Inquiry Officer, and the Board of Immigration Appeals.

The Board of Immigration Appeals stated,

"Even if the Respondent's story is to be believed, and even if it is to be conceded that the circumstances under which she entered the practice of prostitution may have amounted to duress, nevertheless the continuance of the practice of prostitution until at least late in 1957 is not explained and cannot be defended on the ground of duress."

Was this finding "Supported by reasonable, substantial, and probative evidence on the record considered as a whole . . .," 8 U.S.C. Section 1105 (a) (4)?

And, if so, what standard did the Special Inquiry Officer and also the Board of Immigration of Appeals use when they found that Mrs. Woodby was deportable for her acts which were alleged to have been committed after June 1, 1957, which is the period of time to which she does not admit having engaged in acts of prostitution. In order to determine the basis of the decision of the Special Inquiry Officer and also of the Board of Immigration Appeals it is necessary to look at all of the testimony which was introduced before the Special Inquiry Officer which would be adverse to the Petitioner in this Case. The only person who ever testified as to the Petitioner having engaged in prostitution, was the Petitioner herself. The determination of fact, as made by the Special Inquiry Officer, that the Petitioner engaged in prostitution after June 1, 1957, was based upon certain dates which had been given by the Petitioner, by Mr. Amicon, and by other witnesses at the Hearing.

The Special Inquiry Officer made findings of fact which were not supported by the record, in this case. In his decision, it is stated that Mr. Amicon stated that he met the Petitioner in October of 1957 (R. 77). As a result of this meeting, the Special Inquiry Officer erroneously found that the Petitioner had been practicing prostitution from April, 1957, until September, 1957, or for approximately six months, because Mr. Amicon was told by his dinner companion that the Petitioner was "in the business" at the time of his introduction to her. This statement at best can be considered as hearsay. In the record of the proceeding it is stated that the Petitioner went to Knoxville, Tennessee for several months, and remained there until July 4, 1957; that she lived with a Mrs. Jackson, first on Rugby Road and then moved to above Neil's Restaurant in September of 1957. The Petitioner met Mr. Amicon about one month later, as aforesaid. She stated in the record

that she ceased practicing prostitution prior to her leaving for Knoxville, Tennessee. The entire time sequence is erroneously stated in the decision.

The Special Inquiry Officer found that Mrs. Woodby moved to Summit Court in February of 1957, and resided there to February, 1958 (R. 78). This finding is again contrary to the evidence because Mrs. Woodby lived for a period of time in Knoxville, Tennessee, from where she returned from July 4, 1957 (R. 63 and 68), and she moved to 1500 West Riverview (R. 68), approximately one month before she met Mr. Amicon in October of 1957 (R. 50). Mrs. Woodby resided at 1500 West Riverview until approximately January 1, 1958 (R. 68). If Mrs. Woodby resided with Mrs. Jackson at 1500 West Riverview from September, 1957, until January, 1958, it would be impossible for her to be living on Summit Court as found by the Special Inquiry Officer (R. 78). There is no question that there is some confusion about the exact time the witnesses lived at a certain location, but as shown above, these dates are mutually corroborated by the witnesses. As a result of these minor discrepancies in dates however, the Special Inquiry Officer so construed these dates that he felt that there was sufficient reason to deport the Petitioner. This is one of the reasons that in a case as grave as this that this Court must determine what standard will be used for weighing the evidence.

The decision of the Board of Immigration Appeals again contains partially the same confusion of dates as those contained in the finding of the Special Inquiry Officer. In their finding it was stated that it was not clear from the testimony, whether the Petitioner terminated her acts of prostitution in 1957 or 1958. It is clear, under the facts, that the Petitioner terminated her acts of prostitution in approximately June of 1957 and, therefore, the finding that she committed acts of prostitution after that date is

clearly erroneous. The correct time sequence is as follows:

(1) The Petitioner began the practice of prostitution approximately April 1, 1957 and engaged therein for approximately two months (R. 59).

(2) The Petitioner traveled to Knoxville and returned therefrom on July 4, 1957 (R. 63 and 68).

(3) The Petitioner lived with Mrs. Jackson, first on Rugby Road and then at 1500 W. Riverview, above Neil's Restaurant from July 4, 1957, until October of 1957 when she met Mr. Amicon (R. 50 and 68).

The Special Inquiry Officer and the Board of Immigration Appeals erroneously found that the Petitioner had engaged in prostitution after June 1, 1957. The Hearing took place in November of 1961, and in March of 1962, while the acts of prostitution took place in 1957, approximately four years earlier. There is no question that there were discrepancies in the dates that were given, but this is certainly not a sufficient reason to deport the Petitioner.

It is up to the Court to determine if the decision of the Special Inquiry Officer was supported by "reasonable, substantial, and probative evidence" (8 U.S.C. 1105 (a) (4)). The statute creates this judicial standard for review, but leaves open the degree of proof that must be introduced before the Special Inquiry Officer, for the Immigration and Naturalization Service to sustain its required degree of persuasion. This required degree of persuasion pursuant to the statute may not be reasonable *or* substantial *or* probative, but rather all three criteria must be present.

This Court in *Gastelum-Quinones v. Kennedy*, 374 U.S. 469 (1963) held that "substantial" evidence in finding a "meaningful association" with the Communist party was more than by a preponderance of the evidence. The evidence in that case showed that the Petitioner was a dues-paying member of the Party from 1949 to 1951, that he attended at least 15 Party meetings, that he was an official,

and that he attended a Party convention. The Petitioner did not deny any of these facts, and this Court found that the deportation Order was not supported by substantial evidence. This testimony alone should have been sufficient to sustain the burden required of the Government if it were only by a preponderance of the evidence, but it was not. This Court required a greater quantum of proof when it said that the deportation order was not supported by substantial evidence. It is not clear the degree of proof that the Court was seeking, but whatever it was, the Government did not meet it.

As in civil cases, it is up to the Court to determine what degree of persuasion would be required of the proponent in a particular case, which degree of persuasion would depend upon the particular type of case (Wigmore, Evidence Sec. 2497 (3rd Ed. 1940)). The type of proof and the degree of proof required has always been established by the judiciary (McBaine, Burden of Proof; Degrees of Proof 32 Cal. L. Rev. 242 (1944)). The degree of proof required should be determined by the severity of the ultimate result of the decision. In the case at bar, the ultimate result is deportation of an alien who was legally admitted to the United States; she has two minor children who reside in the United States; and if deported, she will be deported to Germany, and if not accepted by Germany, then to Hungary, a Communist country. For a woman who has lived in this country for ten years, this is indeed a harsh result.

In *Sherman v. Immigration and Naturalization Service*, 350 F. 2d 894 (1965) Judge Waterman, while discussing the burden of persuasion required, stated that in some cases courts have required one party to carry the burden usually borne by the prosecution in criminal cases, such as where it was necessary to prove nonaccess beyond a reasonable doubt in overcoming the presumption of legitimacy.

He then concluded by saying "the Government is required to establish that it is *almost certainly true* that Petitioner entered the United States without inspection in 1938; in other words, the Government must prove beyond a reasonable doubt the facts upon which deportation depends."

In *Rowoldt v. Perfetto*, 355 U.S. 115 at 120 (1957) this Court stated that "solidity of proof" is required for a judgment entailing the consequences of deportation. Again the judgment by a preponderance of the evidence was denied and this higher standard was used.

*Gastelum, Sherman, and Rowoldt*, are just three cases where the Courts have required a higher standard than proof by a preponderance of the evidence in deportation cases.

In a denaturalization proceeding, the evidence must be "clear, unequivocal, and convincing." Is a deportation proceeding so different that the degree of proof required should be any less? If the Petitioner would have been sought to be deported because of having been convicted of the criminal act of having engaged in acts of prostitution, the standards would be quite different than those used here. She would have been afforded a trial, either by a Court or by a jury, at her choice, and the degree of persuasion upon the State to prove her guilt would have been "beyond a reasonable doubt."

If found guilty of such a charge then the Petitioner would have been deportable (8 U.S.C. 1251). *In this case the Petitioner was never criminally charged, tried, or convicted of having engaged in prostitution. Because the Petitioner was never charged or tried criminally, should she be subject to deportation by the application of a civil degree of persuasion that is less than the degree of persuasion required in a criminal case?*

The degree of persuasion in this case should have been either "beyond a reasonable doubt" as required in criminal

cases or at least by "clear, unequivocal, and convincing" evidence.

On the other hand, if the statute requiring the finding of the Special Inquiry Officer to be supported by "reasonable, substantial and probative evidence" is thought to set the degree of persuasion for the Special Inquiry Officer, then this language is not so inflexible to prevent this same finding.

Substantial evidence may arguably be considered evidence that is "clear and convincing," or "beyond a reasonable doubt."

If the evidence is found by the Special Inquiry Officer to be "clear and convincing," then his finding may be considered supported by "substantial" evidence. The underlying determination as to the substantiality of the evidence must therefore be made by the Special Inquiry Officer. His determination, however, must be reasonable when considering all of the evidence. One writer in this field stated "... the enforcement of a right of considerable importance to the proponent cannot be made subject to a power of completely free evaluation of the evidence" (Lewis L. Jaffee, *Judicial Control of the Administrative Action* (1965) at Page 608).

Deportation is certainly one of the greatest penalties an alien can suffer. Mr. Justice Brandeis, when discussing the gravity of deportation, once stated: "It may result also in loss of both property and life; or of all that makes life worth living" (*Ng Fung Ho v. White*, 259 U.S. at 276 (1922)).

Using either theory of approach that:

1. The standard of "reasonable, substantial and probative" is only the standard for the reviewing Court to apply to determine if the Special Inquiry Officer applied the correct standard in the particular case as established by this Court, or

2. That "reasonable, substantial and probative" in the deportation case means "clear, unequivocal, and convincing," or "beyond a reasonable doubt" because the evidence must be such in a deportation case such as this, in order to be "substantial" or "reasonable."

The same conclusion can be arrived at when examining the evidence in this case using either theory. Either theory would require the Court to establish the required and necessary standard for the degree of persuasion required to be presented in this particular type of case. Since the main concern is the protection of the rights of the alien who may be subject to deportation, it is incumbent upon the Courts to protect these rights by establishing certain standards that must be used in the hearing process.

Mrs. Woodby engaged in prostitution from approximately April 1, 1957 to approximately June 1, 1957. She admitted having engaged in these acts of prostitution during this period of time, but her defense to having engaged in such acts was duress. Neither the Special Inquiry Officer nor the Board of Immigration Appeals found that Mrs. Woodby was not acting under duress during this period of time and therefore for the sake of argument assumed that her defense was proper. The sole basis for the deportation order was that they found that Mrs. Woodby, in fact, engaged in acts of prostitution after June 1, 1957. The Special Inquiry Officer found that Mrs. Woodby engaged in prostitution until October, 1957, when she met Mr. Amicon. The finding that Mrs. Woodby engaged in prostitution until October, 1957, was based upon the statement by Mr. Amicon that he was told by a dinner companion that she was "in the business." Mr. Amicon testified that Mrs. Woodby did not engage in acts of prostitution after he met her, and that as far as prior to that time, he did not know. Mrs. Woodby testified that she had ceased her such acts prior to leaving for Knoxville, Tennessee, which would have been in early June of 1957.

The Special Inquiry Officer became confused as to certain dates. This is not unusual because the Hearing took place approximately four (4) years after the events that the parties were questioned about. The question that is presented before this Court, however, is because of some confusion in dates in the record, is this sufficient to find that the Petitioner should be deported?

The evidence of a party having the burden of proof may not be disbelieved without an explicit and objectively adequate reason. See *Mar Gong v. McGranery*, 109 F. Supp. 821 (S.D. Cal. 1952). In that case the testimony was rejected ostensibly because of discrepancies on minor matters; but the opinion of the trial Judge revealed that his rejection was based on a general—and in a statistical or administrative sense quite legitimate—suspicion of such claims and inherent difficulties of uncovering fraud. The Courts have held as a matter of law that the evidence of one having the burden of proof must be accepted even though it may not be believed by the trier of the fact or at least it has not convinced him. See *Carmichael v. Wong Choon Ock*, 119 F. 2d 173 (9th Cir. 1941); *Gung You v. Nagle*, 34 F. 2d 848 (9th Cir. 1929).

If the proponent has presented the best available evidence which is logically adequate, and is neither contradicted nor improbable, it must be credited, particularly in a case where the opponent is not an individual who stands to suffer from an adverse finding. In the case of *United States ex rel. Exarchou v. Murff*, 265 F. 2d 504 (2d Cir. 1959), a Petitioner's right to a discretionary suspension of deportation depended on his "good moral char-

acter," and the Court was prepared to accept his testimony as to motivation at its face value.

The Court of Appeals stated "there was much confusion as to the places at which and the times during which she (Petitioner) carried on as a prostitute" (R. 131). They then stated, "We believe our function ends when we find, as we do, that the Board's underlying order is "supported by reasonable, substantial, and probative evidence on the record considered as a whole . . ." (R. 132). In conclusion the Court stated, "We are not at liberty here to proceed on the basis of what we might have done had we been in the position of the immigration authorities" (R. 132). The Court of Appeals did have this duty to review the evidence presented to determine if the Immigration and Naturalization Service met its burden to prove the Petitioner's deportability. This is not one of those cases where one must be specialized or an expert to evaluate the evidence presented, and therefore the courts must respect their decisions (*Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951)). This is a case where the reviewing court can weigh the evidence to determine the correctness of the agency's determination.

The evidence that was presented was not sufficient to even meet the normal civil burden test of "by a preponderance of the evidence," let alone meet the tests of "clear and convincing" or "beyond a reasonable doubt."

On the surface it would appear that the testimony given to the original investigating officer could give rise to a basis for a finding of fact that Petitioner did engage in prostitution between June 1, 1957 and October 1, 1957. A more complete examination however reveals that the

statements made in such initial investigation must be (and by the Government have been) repudiated in full for the following reasons:

(1) At the Hearing to show cause, Petitioner repudiated her prior statement as being untrue.

(2) At the Hearing to show cause, all facts touched upon in the earlier statements were reexamined to the fullest extent desired by the Government and counsel for Petitioner, obviating any need for reference to the impeached statements.

(3) Admission of the prior statement with the Petitioner and witness available to testify and testifying as to all facts contained in the prior statements rendered the use of these statement inadmissible in the proceeding.

(4) While the statements could be used to impeach the Petitioner and Mr. Amicon who were the sole Government witnesses, they cannot be used to provide positive proof of facts.

(5) The introduction of these statements was objected to for the reason that counsel did not have the opportunity to examine the statements prior to their introduction or to cross-examine the witnesses at the time of the taking of the statements, and they were therefore improperly admitted.

Possibly the best summation of this factual fiasco is to plagiarize from an expert who stated:

"At this point it is appropriate to warn against our tendency almost unwittingly to take the 'principles' of administrative law as dogma. Limited Judicial review is not an absolute value; it is a resolution of conflicting considerations, a resolution which is valid for most cases. But it would be difficult to deny that independent re-evaluation by a reviewing body gives a defeated party an additional protection."

(Jaffee, Judicial Control of Administrative Action; Page 647 (1965)).

**II. DID THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT COMMIT ERROR BY NOT RETURNING THIS CASE TO THE UNITED STATES DEPARTMENT OF JUSTICE, DIVISION OF IMMIGRATION SERVICE TO ADDUCE ADDITIONAL EVIDENCE AS REQUESTED IN THE PRAYER FOR RELIEF IN THE BRIEF FILED BY THE PETITIONER IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IN THIS CAUSE.**

There were many discrepancies in the times, dates and places in this case which were understandable for the reason that the acts of prostitution took place early in 1957 and yet the hearing before the Special Inquiry Officer was held on March 28, 1962, approximately 5 years later. Because of the time span, much confusion was caused by pinpointing exact times and places and yet this entire case has resolved itself around the exact time that these acts of prostitution took place. The confusion of times and places and the lack of facts is substantiated in the decision of the Court of Appeals when they stated, "Even if it were our function to appraise the harshness of the deportation of this petition, we do not have sufficient facts before us upon which to form our own judgment thereon."

Title 5, U.S.C. 1037 (c) *provides that a Court of Appeals may order additional evidence taken in a case such as this, and that a Certified Transcript of such additional evidence and modified or new findings shall be filed with the Court of Appeals. In the case at bar the Court of Appeals did not even act on this request by the Petitioner even though the facts as alleged by the Petitioner did constitute a complete defense to a deportation order. Since the only evidence contained in the record which was used to find the Petitioner deportable, was the testimony of the Petitioner alone, we take the position that it was incumbent upon the*

*Court of Appeals to order additional evidence taken to clear up the discrepancies in times, dates, places and facts as contained in the record in this case.*

There is neither a showing in the record or any other place that the respondent had ever practiced prostitution prior to the 2 month period during which she concedes practicing prostitution, nor, is there any showing that she had committed any acts of prostitution subsequent to this 2 month period.

*The relief prayed for in the Court of Appeals was, to reverse the findings of the Board of Immigration Appeals and the finding of the Special Inquiry Officer and terminate the deportation proceedings pending against the Petitioner, or in the alternative to remand the case to the Department of Justice for the taking of further evidence.*

The Court of Appeals refused to reverse and in fact sustained the findings of the Board of Immigration Appeals and the finding of the Special Inquiry Officer. *However, it never acted, neither affirmatively nor negatively upon the request that the case be remanded to the Department of Justice for the taking of further evidence as it had the duty to do under Title 5, U.S.C. 1037 (C).*

## CONCLUSION

The first tragic experience in the Petitioner's life is reflected when she was raped by a Russian or an Hungarian when she was about 15 years old in 1946 (R. 14). She worked for a year and a half after that in Germany to support her mother who was in a hospital, until she died (R. 15 and 16). She later married an American serviceman in Germany, who left her there for a year and a half after he returned to the United States (R. 54). She then came to the United States in 1957, and after living in Harlan, Kentucky, with her in-laws for about six months,

during which time her husband never worked (R. 55), the Petitioner and her husband moved to Dayton, Ohio. Petitioner delivered a second child in Dayton, Ohio (R. 56), and about four months later her husband put her on a bus to Pennsylvania (R. 57) and when she returned her husband and children were gone. Subsequently, her husband called and told her that he needed \$300 for an operation for the baby (R. 60). She said she did not have the money and he told her "If you are mother enough, you know how to get it, if you care enough for the child" (R. 61).

The rest of the tragic story has been set forth in this Brief and in the record, and she did send the \$300 to her husband for the child. The Immigration and Naturalization Services claimed at first that this was not duress. They then found that the Petitioner engaged in prostitution after the duress had ended. They based this finding upon the confusion as to dates and places in the record. This was a confusion that existed four years after the fact. If each witness testified as to exact dates and places, they would have argued that the witnesses had been coached, because people just do not remember such minutia.

Can we say that because this confusion exists, that there is "reasonable, substantial and probative evidence" with which to deport the Petitioner? Must this be the conclusion of her tragic life? Is this evidence sufficient to tear this mother away from her two minor children, age 10 and 12, probably never to see them again?

To believe or to disbelieve must not be the test to support a deportation order. It must be much more in order to create such a tragic end to a life that could be worth living. Whether the test be one of "solidity of proof" or "clear and convincing" or "beyond a reasonable doubt," the Immigration and Naturalization Service has not met its proper burden of persuasion.

It is respectfully submitted that this Court reverse the lower Court decisions finding that the Petitioner is subject to deportation.

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